FILED
APR 24 1951
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term 1950
No. 693

SELMA KANTZ, Administratrix of the Estate of Manny Dyskant and Marian Dyskant, and Herbert Dyskant and Theodore Dyskant,

Petitioners,

against

FUGATE AND GIRTON DRIVEWAY CO., INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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FUGATE AND GIRTON DRIVEWAY CO., INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case.

Opinion Below

The Court of Appeals for the Sixth Circuit did not render an opinion. The judgment is not officially reported, and bears Docket No. 11236, decided on the 8th day of February 1951.

Jurisdiction

The judgment of the Court of Appeals was entered on the 8th day of February, 1951. The jurisdiction of this Court is invoked under 28 U. S. C., 1254 (1).

Questions Presented

(1) May a Trial Court take from the jury unto itself the prerogative of deciding controversial issues of fact raised by the evidence.

(2) May a Trial Court disregard the well established substantive law of the state wherein an accident occurred and substitute its own version of the law, which is contrary thereto.

(3) Whether a Trial Court may hold that it is, "an Act of God", as a matter of law, when a truck strikes a private vehicle, which had gone into a skid into the center lane of a three-lane highway, and which accident results in the death of two passengers, serious injury to a third as well as to the driver, where the truck driver testified that he saw the car go into a skid approaching from the opposite direction and over 100 feet away from him, and where said truck driver admits that he did not turn off from the center lane into the right lane to avoid striking the helpless car.

(4) Is the Court of Appeals correct in sustaining a decision of a Trial Court, which has refused to permit a jury to pass upon controversial issues of fact amply supported by the testimony.

Statement

This is an appeal from a judgment without opinion of the Court of Appeals for the Sixth Circuit entered on the 8th day of February, 1951 affirming a judgment entered on the 7th day of October, 1949 on a directed verdict of the United States District Court for the Southern District of Ohio—Western Division, in favor of the respondent and against the petitioners, as well as an appeal from an order

entered on the 9th day of November, 1949, in said District Court denying petitioners' motion to set aside the directed verdict and for a new trial.

Specification of Errors to be Urged

The Trial Court's direction of the verdict was contrary to the substantive law of the State of Virginia where the accident happened. The holding that it was "an Act of God", as a matter of law, when the private car was struck by the truck coming in the opposite direction, after the private car has gone into a skid, irrespective of the fact that the truck driver had ample time and opportunity to avoid the collision was error.

(The Court held that neither the driver of the car nor his brother who was in the front seat with him, nor their parents were in anywise responsible for the accident.)

Reasons for Granting the Writ

1. The Court below erred in taking from the jury onto itself the prerogative of deciding controversial issues of fact raised by the evidence, thus denying to the petitioners their Constitutional right to a trial by jury.

2. The Court below erred in disregarding the well established substantive law of the state wherein an accident occurred and substituting its own version of the law, which is contrary thereto, thus refusing to be governed by the decisions of our Appellate Federal Courts.

3. The Court below erred in holding that it was, "an Act of God", as a matter of law, where the testimony established an issue of fact under the law applicable.

4. The Court below erred in sustaining the Trial Court in its denial of the Constitutional right of a trial by jury to the petitioners on a controversial issue of fact amply supported by such evidence as required by *lex loci.*

Conclusion

Petitioners pray for a writ of certiorari so that they might be granted a constitutional right to have a jury pass upon controversial issues of fact, supported by such evidence as required by the *lex loci.*

Respectfully submitted,

JACOB RASSNER,
Proctor for Petitioners.

IN THE

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SELMA KANTZ, Administratrix of the Estate of Manny Dyskant and Marian Dyskant, and Herbert Dyskant and Theodore Dyskant,

Petitioners,

against

FUGATE AND GIRTON DRIVEWAY CO., INC.,

Respondent.

BRIEF IN SUPPORT OF PETITION

This is a petition for a writ of certiorari to review a judgment of the Court of Appeals for the Sixth Circuit entered on the 8th day of February, 1951, which, without an opinion, affirmed the Trial Judge's direction of a verdict at the close of respondent's case before a Judge and jury. This affirmance is not officially reported, and bears docket number 11236, entered on the 8th day of February, 1951.

Statement of Grounds on Which Jurisdiction is Invoked

The grounds from which the jurisdiction of this Honorable Court is invoked are as follows:

1—The Court of Appeals for the Sixth Circuit rendered a final judgment in affirming the Trial Court's direction

of the verdict at the close of respondent's case, and under the circumstances herein thereby sanctioned a departure by the Trial Court as to call for an exercise of this Honorable Court's power of supervision.

2—In that the Court of Appeals for the Sixth Circuit affirmed the Trial Judge's decision which deprived petitioners of their constitutional rights to a trial by a jury.

3—In that the Court of Appeals for the Sixth Circuit affirmed the Trial Court in its disregard of the law of Virginia, applicable herein.

4—In that the Court of Appeals for the Sixth Circuit affirmed the Trial Court in its disregard of local law and its decision rendered in conflict with applicable local decisions.

5—In that the Court of Appeals for the Sixth Circuit erred in affirming the Trial Judge's decision that the collision was an inevitable accident, after conceding that neither of the Dyskant boys nor their parents were at any wise responsible for the accident.

Statement of Facts

On February 11, 1948, at about 2:10 P. M., Manny and Marian Dyskant were fatally injured and their two sons permanently injured while in a 1946 Plymouth sedan, upon collision with the respondent's truck on Route 301, two and one-half miles south of Petersburg, Virginia * (6, 36, 48, 78, 83, 90, 102, 166, 167, 211).

The sedan was driven by petitioner, Theodore Dyskant, and seated alongside him was the owner of the vehicle, his brother Herbert (23). Their deceased parents were on the rear seat (211).

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* Numbers in parenthesis refer to pages of the Record.

The truck, driven by one Paul Grody, without an assistant, in the scope of the respondent's business (2, 6, 244) had six-wheels and weighed about eight and a half tons, including a refrigerator body, with dimensions of about twenty-five (25) feet in length and about seven (7) feet in width (192, 242, 243, 244).

Prior to the collision the sedan had traveled in a southerly direction towards Florida and the truck had proceeded in a northerly direction from Wilson, North Carolina, towards Baltimore, Maryland (23, 205).

The collision occurred in the center lane of a three-lane highway, each lane about ten (10) feet in width and made of asphalt (25, 26, 33, 206). There were no eye-witnesses to the accident apart from the occupants of the vehicles involved (187, 269, 281, 282).

Prior to the accident a snow plow had substantially cleared the northbound and southbound lanes, leaving embankments of snow on the edges of the road (33, 103, 186, 233). The center lane was slushy (157, 198, 206, 244). Visibility was good and though it had been raining before there was no rain falling at the time of the accident (30, 133). Grody testified that he could see about nine hundred (900) feet ahead and even further than the driver of the sedan, as his position in the truck was higher (245).

Just prior to the accident the Plymouth sedan had moved into the center lane for the purpose of passing another car then proceeding ahead of it in a southerly direction (29, 78). The truck was then about one thousand (1000) feet away proceeding north (30, 78, 103, 104, 107, 117), while the car in front of the Plymouth sedan was about two hundred (200) to two hundred fifty (250) feet ahead (58, 93). Both brothers then saw that the truck was straddling both the north and center lanes in a dangerous manner (in violation of Section 2154, paragraph 114(c) of the Virginia Code) (24, 296). The position of the truck

at that time was described by surviving petitioners as about three-quarters (¾) in the center lane and about eight (8) feet from the edge of its right hand lane (26, 31, 32, 78, 79, 80, 81, 123, 125).

At no time did the truck ever move towards its right in order to get back into its proper lane though there was no car in front of it to pass; but in fact the truck proceeded at an angle further towards the southbound lane (24, 25, 31, 69, 70, 80, 94, 247, 254, 255).

Upon observing the position of the truck and the danger it created, the driver of the sedan started to turn back to the southbound lane. Then the car in front of it was about two hundred (200) feet ahead (114). The speed of the sedan was reduced to about fifteen (15) miles per hour when it was directed to the southbound lane (30, 57, 78, 82, 83).

Before getting off the center lane the wheels of the sedan went over an icy patch, which caused it to skid. The skid started when the sedan was about one hundred fifty (150) to one hundred sixty (160) feet from the truck (19, 24, 25). For the last twenty (20) feet the driver of the sedan applied his brakes with greater force in his attempt to avoid the collision (80).

The Trial Judge erroneously took this latter testimony out of context when he explained his direction of the verdict which incorrectly makes it appear that the skid was only for twenty (20) feet (80, 83, 305, 306).

Grody testified that he saw this skid for about fifty (50) to seventy (70) feet, though respondent's trial counsel concurred in his opening statement with petitioners' estimate of about one hundred fifty (150) feet (19, 248, 250, 251). Though there was sufficient distance for the truck driver to have taken steps to avoid the collision, the truck continued to travel without signal or warning and without

slackening speed at such angle that the truck was directed further into the center lane and in an even more dangerous position (69, 70, 80).

Grody testified that he doesn't recall making any attempt to avoid the accident (256, 257), and did not apply the hand and foot brakes until "just about the instant of the impact" (264). Grody admitted that up to the time of impact he had at least three (3) feet to his right up to the edge of the snow bank (254), but did not make any attempt to avoid the accident though he saw the sedan in a skid and apparently beyond the control of the driver (248, 256).

The collision occurred in the center lane where the truck was negligently proceeding (33, 69).

Grody further testified that his brakes "slid" after he applied them (272, 273).

By reason of the side-way skid of the sedan and the angle of the truck proceeding deeper into the center lane, upon impact the greater damage was to the left rear section of the sedan and to the *right front* section of the truck (242).

The truck did not stop at the time of impact, but pushed the car for another ten (10) to fifteen (15) feet (25, 68). Because the vehicles were entangled, the truck backed up straight at a southeast angle, dragging the car part of the way, towards the northbound lane for a distance of six (6) to twelve (12) feet (69, 70, 187, 231). After the truck had backed straight, it then rested with its right rear wheel off the edge of the road facing in a northwesterly direction (69, 70, 190).

Though there were no direct eye-witnesses other than the parties involved, certain witnesses did appear on the scene thereafter, including two peace officers named Price and Belsches, and a civilian named Heath.

Officer Price testified that when he arrived the truck had already backed up from the point of impact, and that Grody had told him that he had backed up (187). The vehicles were then about eight (8) feet apart, and from the physical evidence it appeared that the sedan had been out of control and the truck driver had not attempted to avoid the collision (186, 187). The truck had its right rear wheel off the edge of the road and was facing in a northwesterly direction (190, 192). Price measured off the skid marks of the sedan and they measured about one hundred and ten (110) feet (190). Price further testified that there were no skid marks or other marks of the truck except at the exact scene of the accident (186), which was confirmed by Grody (240), nor did Sheriff Belsches see any marks on the road to indicate that the truck had attempted a complete stop (198, 203).

Price testified that on the right side of the northbound lane there was a small embankment of snow about eighteen (18) to twenty-four (24) inches high which would not have prevented the truck from going through to its right over slightly graded ground to avoid the collision (186). Grody confirmed the size of the snow bank (233), and Sheriff Belsches confirmed the fact that the ground was level and graded to the right of the northbound lane at the scene of the accident (196, 197).

Officer Price further testified that there was no indication whatsoever that the truck attempted to go to its right (186), and that apparently the truck had been over into the passing lane (185).

Grody admitted that at the time of impact the truck was in part out of its own lane (257, 258).

Mr. Heath testified that when he came upon the scene, the front of the truck was two feet nearer to the line separating the northbound lane from the center lane than the rear of the truck, and was approximately at the line even after having backed up (159, 160, 161).

Sheriff Belsches, a peace officer for 22 years and Sheriff for 17 years, testified that under prevailing conditions the truck with brakes in good condition should have stopped about twenty (20) feet after the brakes were applied (197, 203). The Sheriff further testified that there were no marks on the road to show that the truck attempted a sudden and complete stop (198, 203), and that truck marks would have shown on the northbound lane if the brakes had been applied with sufficient strength (198, see 33).

Grody admitted the road was "relatively clear" at the point where his truck had been (240), which would have caused tire marks if he had applied his brakes to attempt a stop before impact, according to the Sheriff's testimony. This confirms Grody's testimony that his brakes would not hold and that he did not apply his hand and foot brake at the same time until just about the instant of the impact (264, 272). It follows that the defective brakes caused the truck to travel fifty (50) to seventy-five (75) feet after they were applied by Grody, if he applied them at all (253).

The credibility of Grody's testimony on which the Trial Judge predicated the directed verdict herein is assailed by Grody's frequent contradictions throughout his testimony. He denied ever having been in any accident, or charged with any traffic violations (220, 221, 230), then on cross-examination admitted he had been involved in four previous accidents (222, 223, 225).

The directed verdict at the close of respondent's case was explained by the Trial Judge on the basis of absence of fault of the respondent's truck driver and of the petitioners (305, 308, 309). He ruled that in any event there can be no imputed negligence to either the owner of the car or the deceased parents (300, 308).

The Court below was in error in the following respects:

1. In taking from a jury a decision on controversial issues of fact.

2. In disregarding the law of Virginia on the Last Clear Chance doctrine which is applicable herein.

3. In holding that the collision was an inevitable accident, after conceding that neither of the Dyskant boys nor their parents were in any wise responsible for the accident.

ARGUMENT

POINT I

It was error to hold that a Trial Court may take from the jury onto itself a decision on controversial issues of fact supported by the testimony.

The respondent completely failed to offer any proof of its freedom from negligence.

It seems there was more than ample evidence to sustain a verdict in favor of the petitioners; that the Trial Court was clearly in error; that the petitioners did not receive their day in Court on the merits.

The law is clear that on a motion to direct a verdict for the respondent every fact in evidence and every reasonable inference therefrom in favor of the petitioners are admitted by the respondent.

Hellweg v. *Telephone Co.*, 110 F. (2d) 546.

The Court adopted the testimony of the driver that he moved forward but two or three feet after the impact, and refused to consider the testimony on petitioners' behalf that the truck went forward some ten or fifteen feet from the center lane, pushing the petitioners' car.

The Court decided as a fact that the accident happened at a place where the truck driver had a right to be, in spite of the fact that by his own admission and on the evidence he was over into the wrong lane where he had no right to be; in effect accepting the defense that the accident happened at or near the northbound lane, and decided as a fact that the petitioners' evidence that the accident happened as the private car had turned from the center lane and was already partly in the southbound lane had no probative value.

The Court did not consider the admission by the driver that the truck's brakes failed to hold.

The Court did not consider the fact that the driver continued riding down with the left side of the truck in the wrong lane without making any effort to turn to his right to avoid the collision, in spite of the driver's admission that he had three feet of roadway and proof by respondent's witness that there was some ten additional feet of level ground that the driver could have gone onto without experiencing any greater inconvenience than a slight bump.

In addition to the fact that there was practically no evidence to support a verdict in favor of the respondent, the Court erred in substituting its opinion on disputed questions of fact, in place of a jury's.

In the case of *Howard* v. *Louisiana & A. Ry. Co.*, 49 Fed. (2d) 571, the Court stated on page 574:

> "This state of the evidence requires that the issues of fact raised upon conflicting testimony 'shall be settled by a jury, and that the court shall not assume, directly or indirectly, to take from the jury or to itself such prerogative'."

In the case of *Baltimore & Ohio R. R. Co.* v. *Groeger*, 266 U. S. 521, the Court stated on page 524:

> "The credibility of witnesses, the weight and probative value of evidence, are to be determined by the jury and not by the judge."

As early as 1830, in the case of *Parsons* v. *Bedford*, 3 Pet. 433, 1830, 28 U. S. 433, the Court laid down a principle of law which has consistently been followed by all the Courts of this country, and which principle was reiterated in the case of *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364, wherein the Court stated on page 378 as follows:

> "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy."

Said Court further stated, on page 378, quoting from the case of *Walker* v. *New Mexico &c. Railroad Co.*, 165 U. S. 593:

> "This requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative."

In the case of *Johnson* v. *Dierks Lumber & Coal Co.*, 130 F. (2d) 115, the Court stated on page 119:

> "Moreover, where reasonable men may draw different inferences from the evidence, it is the province of the jury to determine which is proper."

The Court in *Fratta* v. *Grace Line*, 139 F. (2d) 743, 744, stated as follows:

> "We take this occasion to suggest to trial judges that, generally speaking—although there may be exceptions—it is desirable not to direct a verdict at the

close of the evidence, but to reserve decision on any motion therefor and allow the jury to bring in a verdict; the trial judge may then, if he thinks it improper, set aside the verdict as against the weight of the evidence and grant the motion, Federal Rules of Civil Procedure, rule 50 (b), 28 U. S. C. A. following section 723c, with the consequence that if, on appeal, we disagree with him, we will be in a position to reinstate the verdict, thus avoiding the waste and expense of another trial. Reversed."

The conceded evidence is that the skidding of the private car commenced about one hundred fifty (150) feet before the point of impact and was merely an incident preceding the accident and in nowise to be considered as the proximate cause of the accident.

As late as January 31, 1949, in the case of *Wilkerson* v. *McCarthy,* 336 U. S. 53, 62, 63, this Learned Court stated:

"Moreover, this Court stated some sixty years ago when considering the proper tribunal for determining questions of negligence; 'We see no reason, so long as the jury system is the law of the land and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' Jones v. East Tennessee, V. & G. R. Co. 128 US 443, 445, 32 L ed 478, 480, 9 S Ct 118. And peremptory instructions should not be given in negligence cases 'where the facts are in dispute, and the evidence in relation to them is that from which fairminded men may draw different inferences.' Washington & G. R. Co. v. McDade, 135 US 554, 572, 34 L ed 235, 241, 10 S Ct 1044. Such has ever since been the established rule for trial and appellate courts. See Tiller v. Atlantic Coast Line R. Co. 318 US 54, 67, 68, 87 L ed 610, 617, 618, 63 S Ct 444, 143, ALR 967. Courts should not assume

that in determining these questions of negligence juries will fall short of a fair performance of their constitutional function. In rejecting a contention that juries could be expected to determine certain disputed questions on whim, this Court, speaking through Mr. Justice Holmes, said: 'But it must be assumed that the constitutional tribunal does its duty and finds facts only because they are proved.' Aikens v. Wisconsin, 195 US 194, 206, 49 L ed 154, 160, 25 S Ct 3."

See:

Jacob v. *City of New York,* 315 U. S. 752, 62 S. Ct. 854.

POINT II

It was error to refuse to consider and be bound by the laws of the State of Virginia, which constituted a *lex loci.*

The Trial Court stated that neither the living nor the deceased petitioners were guilty of negligence. The respondent's truck driver on the other hand clearly saw or should have seen the private car go into a skid about 150 feet away. There was a three-lane highway, the center one for passing only; nevertheless, the truck driver drove partly in the center lane and failed to pull back into his right hand lane, which he could have done with but the slightest effort and thus have avoided the accident.

There is clearly no excuse for the truck driver continuing on with his truck after the impact for a distance of about 10 to 15 feet.

There is no excuse for the truck driver driving at an angle in the center lane and towards the petitioners' car instead of away from it.

There was no excuse for the truck driver failing to apply his brakes for a distance of 150 feet while approaching the petitioners' helpless car, until the instant of impact.

See:

Channell v. *Sampson,* 108 F. (2d) 315 (judgment for plaintiff affirmed on facts similar to case at bar);

Swift & Co. v. *Young,* 107 F. (2d) 170 (charge of Trial Court upheld as to last clear chance doctrine in "skid" case, even where not pleaded).

As the "two issue rule" applies herein so that the jury should have been allowed to determine whether the respondent was solely negligent or whether the Last Clear Chance doctrine should impose liability irrespective of any negligence of the driver-petitioner, it follows that the Virginia law on the Last Clear Chance doctrine should have been considered by the Trial Judge before directing a verdict for the respondent.

See:

Swift & Co. v. *Young, supra*;
Mayer v. *Puryear,* 115 F. (2d) 675;
Rose v. *Phillips Co.,* 21 F. Supp. 485.

The accident having happened in Virginia, the law of Virginia applies, thereby imposing liability upon the respondent whose truck driver last had a clear opportunity of avoiding the accident, notwithstanding the fact that the petitioners' car had skidded. Assuming for the sake of argument that the skidding of the private car tended to bring about the ultimate accident, such skidding was not the proximate cause of the accident. The proximate cause of the accident was the event after the skidding, and not skidding, namely, the conduct of the respondent's driver

under the circumstances in failing to comply with the law applicable, that he take advantage of the last clear chance to avoid the collision.

N. & W. v. *Crocker,* 117 Va. 327, 84 S. E. 681;
Kabler v. *So. Ry.,* 121 Va. 90, 92 S. E. 815;
Virginia Electric & Power Co. v. *Evich,* 152 Va. 236, 146 S. E. 265.

In Virginia, the Last Clear Chance doctrine, also known as the Humanitarian Doctrine, does apply even where the respondent did not actually know of petitioners' peril but in the exercise of reasonable care *could have* seen the petitioners.

Perkinson v. *Persons,* 164 Va. 172, 178 S. E. 682 (motorist liable as he could have seen pedestrian 150 feet away);
McGowan v. *Tayman,* 144 Va. 358, 132 S. E. 316;
N & W v. *Crocker, supra.*

It is also the law that whether the respondent had time and opportunity to avoid the accident and whether he did or did not do all that was required of him under the doctrine are questions for the jury.

Norfolk W. R. Co. v. *Mace,* 151 Va. 458, 145 S. E. 362;
Southern Ry. Co. v. *Whetzel,* 159 Va. 796, 167 S. E. 427.

In *Southwestern Imp. Co.* v. *Smith,* 85 Va. 306, 7 S. E. 365, the rule is expressed that when petitioner through negligence of respondent is placed in a situation where he must adopt a perilous alternative, or where, in the terror of an emergency, for which he is not responsible, he acts wildly or negligently and suffers in consequence, such negligent conduct under these circumstances is *not* contributory negligence.

In accord:

Adamson v. *Norfolk etc. Tract Co.*, 111 Va. 556, 59 S. E. 1055;
Walton v. *Miller*, 109 Va. 210, 63 S. E. 458.

POINT III

The holding that a head on collision in broad daylight in the center lane of a three lane highway where there were only two cars on the highway at the time constitutes "an act of God", is erroneous.

The Trial Court held that the petitioners were not guilty of any fault.

The Court erroneously held that the respondent's driver was not guilty of any fault, and in substance that this was an unavoidable accident.

We have heretofore demonstrated in many ways in which the accident could have been avoided by the use of ordinary care on the part of the respondent's truck driver. The Court having found that the petitioners were not guilty of any fault, we are therefor faced with the question of whether liability is imposed on the respondent by reason of the truck driver's failure to avoid the collision.

The physical facts show that there was ample time and opportunity to avoid the accident, and sufficient roadway and level ground abutting the roadway on which the truck could have safely driven past petitioner's car. There was no excuse for the truck driver being partly in the center or passing lane.

The respondent having failed to prove its freedom from contributory negligence, it was liable to the petitioners as a matter of law, and at the very least, a jury question was raised by the evidence.

The Court in substance ruled that this was an inevitable accident, but the evidence does not support such ruling.

The respondent did not offer any proof to show that the accident was inevitable, failing which, the petitioners were entitled, at the very least, to a submission of the issues to the jury.

The Trial Judge erred in disregarding the long established principle of law as to a defense of "Act of God", expressed in the case of *Gleeson* v. *Virginia Midland Ry. Co.*, 140 U. S. 435, 445, 11 S. Ct. 859, 862, wherein Mr. Justice Lamar stated for the Court as follows:

> "The law is that the plaintiff must show negligence in the defendant. This is done prima facie, by showing, if the plaintiff be a passenger, that the accident occurred. If that accident was in fact the result of causes beyond the defendant's responsibility, or of the act of God, it is still none the less true that the plaintiff has made out his prima facie case. When he proves the occurrence of the accident the defendant must answer that case from all the circumstances of exculpation, whether disclosed by the one party or the other. They are its matter of defense. And it is for the jury to say, in the light of all the testimony, and under the instructions of the court, whether the relation of cause and effect did exist, as claimed by the defense, between the accident and the alleged exonerating circumstances."

The principle expressed in the case of *Gleeson* v. *Virginia Midland Ry. Co., supra,* has recently been affirmed by the United States Supreme Court in the case of *Jesionowski* v. *Boston & Maine Railroad,* 329 U. S. 452, 456.

In the case of *State Road Department of Florida* v. *United States,* 85 F. Supp. 489, the Court stated on page 500:

"Before going further into these conclusions it is appropriate that we give consideration to the question of the burden of proof. I think this burden is on the defendant whenever it pleads in defense either inevitable accident or act of God. See Gleeson v. Virginia Midland Railway Company, 140 U. S. 435, text 444, 11 S. Ct. 859, 35 L. Ed. 458; Atlantic Coast Line R. Co. v. Hendry, 112 Fla. 391, 150 So. 598."

• • •

"The defense of vis major may be successfully interposed in an action for damages resulting solely from an act of God; but if the defendant's negligence is a present contributing proximate cause, which, commingled with the act of God, produces the injury, then the defendant is liable notwithstanding the act of God. Davis v. Ivey, 93 Fla. 387, 112 So. 264; Case note 29 L. R. A., N. S., 663; Case note 42 L. R. A., N. S. 709.

"The burden is on the defendant who interposes the defense of vis major to show that the damages resulted solely from the act of God and that it contributed in no way thereto."

The Court further said (pp. 500, 501):

"I hold, therefore, that the defendant had the burden of showing itself to be free from the commission or omission of any act that proximately contributed to the injury and that if it has failed so to do the defense of inevitable accident and vis major must fall. (Cases cited.)"

QUESTION PRESENTED

DID THE TRIAL COURT PROPERLY DIRECT THE JURY TO RETURN A VERDICT FOR THE RESPONDENT AT THE CLOSE OF ALL THE TESTIMONY IN THIS CASE?

STATEMENT OF THE CASE

Petitioners do not undertake to state the facts in clear and concise chronological order, but intermingle opinions, arguments, conclusions and statements, which are frequently unsupported on the pages cited by petitioners.

Petitioners' statement omits the following pertinent, essential facts:

1. Petitioners, who were fully conscious (169) *, stated on the day of the accident that their car went out of control (177) and they did not know what happened (178).

2. Petitioners, thereafter, stated that the accident occurred in the southbound lane (73, 74, 79, 110, 121, 122, 123); in the center lane (26, 33), and in the northbound lane (25, 127, 129).

3. Respondent's northbound truck was facing north in the northbound traffic lane and the damaged left side of Petitioners' southbound Plymouth automobile was in the northbound traffic lane (154, 155, 157, 163, 167, 168, 216).

4. Neither the front tires nor the dual rear tires of Respondent's northbound truck left any tracks or made any marks in the ice, slush, and snow, concededly covering the center lane, prior to the collision (169, 170, 186, 203).

(*Figures in parenthesis refer to pages of the printed Record.)

5. The tires of petitioners' automobile left tire and skid marks from the point where petitioners' car was driven into the ice, slush, and snow covering the center lane, extending southeast across the center lane and into the northbound traffic lane, terminating at petitioners' automobile which was facing in a westerly direction and was partially in the center and partially in the northbound lane (149, 151, 152, 153, 172).

6. Debris knocked from petitioners' automobile at the time of the impact was partially in the center lane and partially in the northbound lane (175).

7. The physical evidence disclosed that petitioners' automobile had not moved from the point of impact (153, 158, 159, 175, 181, 182).

8. The uncontradicted, undisputed physical facts showed the collision between the left side of petitioners' southbound, skidding automobile and the front of respondent's northbound truck ocurred in the northbound traffic lane (149, 152, 154, 155, 157, 158, 159, 163, 167, 168, 172).

9. Petitioners' counsel conceded that respondent's truck was being operated on that portion of the road that was clear of ice and snow (17).

10. Mr. Grody, driver of respondent's truck, testified he was driving a new truck (233) north in the northbound traffic lane; saw petitioners' Plymouth driven from the southbound lane into the slush and snow of the center lane, and when about fifty feet away, go into a skid and skid clockwise into the northbound lane (208); that he applied the foot brake and emergency hand brake (209); that the impact stalled the motor of the truck and pulled the truck to the left (210).

11. The Honorable Trial Judge did not predicate the directed verdict on the testimony of Mr. Grody but for the reason that plaintiffs had failed to establish a case under the law (307), and there had been no negligence proven as against the defendant under the law (308).

ARGUMENT

Petitioners do not contend that there exists an important question of Federal law, or that there is a conflict in the decisions of the United States Courts of Appeals, or that the questions are of great public interest or concern. The outcome is of little or no importance except to petitioners and respondent.

This petition for a writ of certiorari is merely an attempt to have this Honorable Court determine the correctness of the decision of the Trial Court in directing the jury to return a verdict for respondent at the conclusion of all the evidence, and the affirmance of the Trial Court's judgment by the United States Court of Appeals for the Sixth Circuit.

The decision of the Trial Court and the United States Court of Appeals turns solely upon analysis of the evidence in this particular case.

Petitioners aver that there existed controversial issues of fact. The only controversial issues of fact were those arising from the testimony of petitioners, Herbert Dyskant and Theodore Dyskant, who were fully conscious at the scene of the accident. Herbert Dyskant stated to Officer Ira Price that he did not know what happened (178). Theodore Dyskant stated to Officer Price that the car skidded and went out of control (177). At that time, neither petitioner charged respondent's driver with any act

of negligence. Thereafter, petitioners stated that the accident occurred in the southbound lane, the center, lane, and the northbound lane.

In the case of *Ewing* v. *Goode*, 78 Fed. 442, Mr. Chief Justice Taft said on page 444:

> "When a plaintiff produces evidence that is consistent with a hypothesis that the defendant is not negligent, and also with one that he is, his proof tends to establish neither.

In accord:

Louisville and N. R. Co. v. *East Tennessee V. & G. Ry. Co.*, 60 Fed. 993, 999.

Gunning v. *Cooley*, 281 U.S. 90, 94.

Pennsylvania Railroad Co. v. *Chamberlain*, 288 U.S. 333, Syllabus 1, 2 and 3.

Grand Trunk Western R. R. Co. v. *Holstein*, 67 Fed. (2d) 780, 782 (6th Cir.), Syllabus 2 and 3.

Brown v. *Capitol Transit Co.*, 127 Fed. (2d) 329, Syllabus 1 and 2.

The rule is approved by the Supreme Court of Virginia in the case of *Chesapeake Western Ry.* v. *Shiflett's Admrx.*, 118 Va. 63, 71; 86 S. E. 860:

> "A demand for damages for an alleged wrongful act does not reach the province of the jury if there is no evidence of negligence, or if the evidence only suggests the possibility of negligence, or is as consistent with the absence of all negligence as with its existence. The court has no right to allow the jury to act upon a mere surmise or conjecture."

In addition to the fact that petitioners had failed to offer evidence of negligence on the part of respondent, the uncontradicted, undisputed physical facts clearly disclosed that this unfortunate accident between petitioners' skidding automobile and the front of respondent's northbound truck occurred in the northbound traffic lane.

In the case of *Lee Way Motor Freight, Inc., et al* v. *True,* 165 Fed. (2d) 38 (10th Cir.), Syllabus 2 reads as follows:

> "2. Testimony which is positively contradicted by physical facts is not entitled to credit."

In accord:

> *Galloway* v. *United States,* 130 Fed. (2d) 467 (9th Cir.), Syllabus 3 and 10.
>
> *Liggett* & *Myers Tobacco Co.* v. *DeParcq,* 66 Fed. (2d) 678 (8th Cir.), Syllabus 4 and 7.
>
> *Chambers* v. *Skelly Oil Co.,* 87 Fed. (2d) 853 (10th Cir.), Syllabus 3 and 4.
>
> *Brown* v. *Baltimore* & *Ohio R. R. Co.,* 23 Fed. Supp. 153, Syllabus 7.

The rule is approved by the Supreme Court of Virginia in the case of *Noland* v. *Fowler,* 179 Va. 19; 18 S. E. (2d) 251, Syllabus 2 of which is as follows:

> "2. Even though all the conflicts in the oral testimony have been resolved in favor of a plaintiff by the verdict of a jury, if the physical facts are such as to demonstrate that the oral evidence upon which the jury based its verdict is incredible, then the trial court and the Supreme Court of Appeals are not bound by the verdict of the jury."

And the Court granted final judgment for the defendant.

Petitioners contend that the Last Clear Chance doctrine applies. The undisputed evidence showed that the vehicles were approaching each other at speeds between thirty and thirty-five miles an hour, traveling approximately 45 feet a second; that when one hundred to one hundred-fifty feet apart, petitioners' vehicle skidded and that within two seconds the accident had occurred.

The difference between the cases cited by petitioners in support of their contention that the Last Clear Chance doctrine applied, and the instant case is that in the cited cases there was a lapse of an appreciable period of time, an opportunity for effective action, and the plaintiff had sustained the burden under the Virginia law by showing by a preponderance of the evidence that plaintiff's negligence had ceased and thereafter defendant had a clear chance to avoid the accident.

In the case of *Virginia Stage Lines, Inc.* v. *Lesny, Admrx.*, 175 Va. 351; 8 S. E. (2d) 259, Syllabus 1 and 2 read as follows:

> "1. The doctrine of last clear chance implies thought, appreciation, mental direction, and the lapse of sufficient time to act effectively upon the impulse to save another from injury.
>
> "2. A plaintiff is not entitled to recover under the doctrine of last clear chance upon a mere peradventure. He has no right to hold the defendant liable merely upon showing that perhaps, if the defendant had responded properly, promptly, and instantaneously, he might have been saved. The burden is upon him to show affirmatively, by a preponderance of the evidence which convinces the average mind, that by the use of ordinary care, after his peril was discovered, there was in fact

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioners.

ROBERT KLONSKY,
On Petition.

FILE
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CHARLES ELMORE

In the

Supreme Court of the United States

October Term 1950

No. 693

SELMA KANTZ, Administratrix of the Estate of Manny Dyskant and Marian Dyskant, and Herbert Dyskant and Theodore Dyskant,

Petitioners,

vs.

FUGATE AND GIRTON DRIVEWAY CO., INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court (R. 297-308) is not reported. The Court of Appeals for the Sixth Circuit, in affirming the judgment of the District Court, did not render an opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on February 8th, 1951. No petition for rehearing was filed. The jurisdiction of this court is sought to be invoked by petitioners under Title 28 U.S.C., Section 1254 (1).

> a clear chance to save him. It is insufficient to show that there was a mere possibility of doing so."

In accord:

> *Chesapeake Western Ry.* v. *Shiflett's Admrx.*, 118 Va. 63; 86 S. E. Syllabus 3.

Petitioners' contention that the Honorable Trial Judge held that the accident was an "Act of God" is wholly without merit. The cases involving actions by passengers against railroad carriers have no application to the instant case. The defense of Vis Major was not interposed by respondent. It had no application to the action. It was not necessary for respondent to show it was not negligent.

What petitioners overlook in the cases from which they quote dictum is that what these courts require to be taken as true in favor of petitioners are established facts. This is precisely what petitioners lack; they have no established facts.

The testimony of every disinterested witness; the uncontradicted physical facts, and the testimony of petitioner, Herbert Dyskant, when he testified on page twenty-five of the printed record on direct examination:

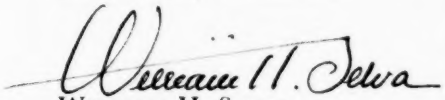
> "* * * Just before the accident he jumped the brakes and we swerved to the northbound lane, swerved to the left, and that is where the truck collided with the car"

fully support the decision of the Honorable Trial Court in directing the jury to return a verdict for the respondent. The affirmance of the judgment by the United States Court of Appeals for the Sixth Circuit is amply supported by the facts and Federal and Virginia authorities.

CONCLUSION

The judgment below is in all respects correct and it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,



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May 19, 1951.